No. _____

In the
Supreme Court of the United States

STEPHANE J. WANTOU SIANTOU,
Petitioner,
v.
CVS RX SERVICES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Can a District Court judge invite the parties counsel to a bench conference for the specific goal of preventing the plaintiff from listening to the discussion, then in the private conference secure the counsels agreements to dismiss the impaneled jury and postpone the next phase of the trial, without infringing on the plaintiff 5th Amendment right to due process and 7th Amendment right to a jury trial?

Can the 4th Circuit hold that insubordination is dispositive of a retaliation case when other Circuit Courts have ruled otherwise, notably the 1st and the 7th Circuits, without providing an explanation?

Can a District Court grant a defendant's Motion for Judgment as a Matter of Law at trial, under Rule 50(a) by weighing evidence, when the plaintiff case and testimony have not been impeached, without reviewing the evidence and without explaining what evidence its decision rests on?

Where a plaintiff makes a prima facie case and presents evidence of mendacity and dishonesty in the explanation given to terminate him, can the employer be granted summary judgment in a retaliation case?

In deciding on summary judgment, whether the District Court can adopt the defendant version of the facts when it is contradicted in the record.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

Stephane J. Wantou Siantou.

CVS Rx Services, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Stephane J. Wantou Siantou has no parent corporations and no publicly held company that owns 10% or more of any entity.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT
8:17-cv-00543-PWG
STEPHANE J. WANTOU SIANTOU v. CVS RX SERVICES, INC.
Order dated 12/7/2018
Defendant's Motion for Summary Judgment GRANTED.
Siantou v. CVS Rx Servs., No. 8:17-cv-00543-PWG, 2018 U.S. Dist. LEXIS 208289 (D. Md. Dec. 7, 2018).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT
PWG-17-0543
IN RE SIANTOU v. CVS RX SERVS.
Judgment dated 11/5/2019
Petitioner's Renewed Motion for Judgment as a Matter of Law, Post Trial Motion for Judgment as a Matter of

Law as to Punitive Damages, and two Motions for Reconsideration DENIED.
In re Siantou v. CVX Rx Servs., No. PWG-17-0543, 2019 U.S. Dist. LEXIS 195820 (D. Md. Nov. 5, 2019).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT
Civil Case No. 8:17-cv-543-PWG
STEPHANE J. WANTOU SIANTOU v. CVS RX SERVICES, INC.
Order dated 1/14/2020
Petitioner's Renewed Motion for Attorneys' Fees GRANTED.
Wantou Siantou v. CVS Rx Servs., No. 8:17-cv-543-PWG, 2020 U.S. Dist. LEXIS 6091 (D. Md. Jan. 14, 2020).

FOURTH CIRCUIT COURT OF APPEALS
No. 19-2262, No. 19-2313
STEPHANE J. WANTOU SIANTOU v. CVS RX SERVICES, INC.
Judgment dated 9/24/2020
District Court's Order AFFIRMED.
Wantou Siantou v. CVS Rx Servs., 822 F. App'x 204 (4th Cir. 2020).

FOURTH CIRCUIT COURT OF APPEALS
No. 19-2262, No. 19-2313
STEPHANE J. WANTOU SIANTOU v. CVS RX SERVICES, INC.
Judgment dated 1/20/2021
Petitioner's motion to exceed length limitations AFFIRMED, Petitioner's request for rehearing and rehearing en banc DENIED.

Siantou v. CVS Rx Servs., Nos. 19-2262 (L), 19-2313, 2021 U.S. App. LEXIS 1592 (4th Cir. Jan. 20, 2021).

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari be issued to review the decisions of the United States' Fourth Circuit Court dismissing his petition for rehearing and affirming the United States District Court for the District of Maryland's grant of summary judgment to the Respondent.

OPINIONS BELOW

The January 20, 2021 decision from the Fourth Circuit Court of Appeals can be found at *Siantou v. CVS Rx Servs.,* Nos. 19-2262 (L), 19-2313, 2021 U.S. App. LEXIS 1592 (4th Cir. Jan. 20, 2021)and is reproduced in the Appendix ("Pet. App. 83a-84a") at Pet. App. 83a-84a.

The September 24, 2020 decision from the Fourth Circuit Court of Appeals can be found at *Wantou Siantou v. CVS Rx Servs.,* 822 F. App'x 204 (4th Cir. 2020)and is reproduced in the Appendix ("Pet. App. 1a-3a") at Pet. App. 1a-3a.

The January 14, 2020 decision from the United States District Court for the District of Maryland can be found at *Wantou Siantou v. CVS Rx Servs.,* No. 8:17-cv-543-PWG, 2020 U.S. Dist. LEXIS 6091 (D. Md. Jan. 14, 2020). This decision is reproduced in the Appendix ("Pet. App. 4a-32a") at Pet. App. 4a-32a.

The November 5, 2019 decision from the United States District Court for the District of Maryland can be found at *In re Siantou v. CVX Rx Servs.,* No. PWG-17-0543, 2019 U.S. Dist. LEXIS 195820 (D. Md. Nov. 5,

2019). This decision is reproduced in the Appendix ("Pet. App. 33a-42a") at Pet. App. 33a-42a.

The December 7, 2018 decision from the United States District Court for the District of Maryland can be found at *Siantou v. CVS Rx Servs.,* No. 8:17-cv-00543-PWG, 2018 U.S. Dist. LEXIS 208289 (D. Md. Dec. 7, 2018). This decision is reproduced in the Appendix ("Pet. App. 45a-82a") at Pet. App. 45a-82a.

BASIS FOR JURISDICTION IN THIS COURT

The Fourth Circuit Court of Appeals affirmed the decision of the United States District Court for the District of Maryland on September 24, 2020. (Pet. App. 2a). This Court has jurisdiction pursuant to statutory provisions 28 U.S.C. § 1254(1) to review on writ of certiorari the decision of the United States Court of Appeals for the Fourth Circuit. This matter brings questions of law that are unsettled.

In *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg*, 545 U.S. 308 (2005), this Court articulated a standard for federal question jurisdiction. The federal issue must be "actually disputed and substantial," and it must be one that the federal courts can entertain without disturbing the balance between federal and state judicial responsibility. *Id.* at 314. Here, that question is whether Fourth Circuit erred in determining that Wantou's claims of retaliation and violation of his Fifth and Seventh rights were unfounded.

STATUTORY PROVISIONS INVOLVED

42 USCS § 2000e-2

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Md. STATE GOVERNMENT Code Ann. § 20-606

> (a) Employers. -- An employer may not:
>
> (1) fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of:
>
> (i) the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and extent so

as to reasonably preclude the performance of the employment; or

(ii) the individual's refusal to submit to a genetic test or make available the results of a genetic test;

(2) limit, segregate, or classify its employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee because of:

(i) the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment; or

(ii) the individual's refusal to submit to a genetic test or make available the results of a genetic test;

(3) request or require genetic tests or genetic information as a condition of hiring or determining benefits;

(4) fail or refuse to make a reasonable accommodation for the known disability of an otherwise qualified employee; or

(5) engage in harassment of an employee.

42 USCS § 1981

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Fed. Rule Civ. Proc. 56(a)

> A party may move for summary judgment, identifying each claim or defense - or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the

record the reasons for granting or denying the motion.

D. Md. Rules 2-501 (a)

> Any party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record. A motion for summary judgment may not be filed: (A) after any evidence is received at trial on the merits, or (B) unless permission of the court is granted, after the deadline for dispositive motions specified in the scheduling order entered pursuant to Rule 2-504 (b)(1)(E).

United States Constitution Amendment V:

> No person shall be… be deprived of life, liberty, or property, without due process of law;

United States Constitution Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Rule 50. Judgment as a Matter of Law in a Jury Trial:

(a) Judgment as a Matter of Law.
(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
(A) resolve the issue against the party; and
(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

STATEMENT OF THE CASE

A. Bringing the Claims to Federal Court.

Petitioner initially filed his claims in the United States District Court for the Northern District of Texas on December 14, 2016, alleging that he was unlawfully terminated in violation of Title VII, 42 U.S.C. § 2000e. (Pet. App. 5a). Petitioner later filed a motion to transfer venue to the United States District Court for the District of Maryland, which was granted. (Pet. App. 5a). On June 7, 2017, Petitioner filed his Amended Complaint advancing four counts against the Defendant: race discrimination (Count I) and retaliation based on his protected class status (Count IV); national-origin discrimination (Count II); and gender discrimination (Count III), in violation of Title VII, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981, and the Maryland Fair Employment Practices Act ("MFEPA"), Maryland Code, Title 20, Section 20-601, et. seq., respectively. (Pet. App. 5a-6a).

In response, Respondent CVS filed a motion arguing that Petitioner had failed to administratively exhaust some of his claims under Title VII and the Maryland Fair Employment Practices Act. (Pet. App. 6a). This motion was granted by the trial court, and CVS ultimately moved for summary judgment on the remaining claims. (Pet. App. 6a). The Court opted to partially grant summary judgment on December 7, 2018. (Pet. App. 7a).

B. Concise Statement of Facts Pertinent to the Questions Presented.

Petitioner Stephane Wantou Siantou ("Wantou") was employed as the head pharmacist at a CVS drug store in Oxon Hill, Maryland between July 2014 and January 2016. (Pet. App. 46a). During this time period, Wantou claims that he was subject to unlawful racial discrimination due to his gender, race, and African heritage. (Pet. App. 46a-47a). Furthermore, he alleges that his January 2016 termination was retaliatory and illegal under several federal and state laws. (Pet. App. 45a-46a).

From the very beginning of his tenure, Wantou felt that CVS's actions towards him were colored by unlawful racial bias. (Pet. App. 46a-47a).

One of the worst points in Wantou's relationship with his supervisor, pharmacy supervisor Tiana Holmes ("Holmes") occurred on January 24, 2015.(Pet. App. 48a-50a). On the day in question, Wantou returned to work after calling in sick even though he was still severely ill. (Pet. App. 49a). After alerting Holmes of his condition and asking in vain if another pharmacist could fill in for him, Wantou received permission from Holmes to warm up in his car. (Pet. App. 49a). Wantou spent the majority of his shift going back and forth between the pharmacy and his car in order to warm up. (Pet. App. 49a).Despite presenting a Doctor's note excusing his absence, and emergency room notes, Wantou was issued a Level I reprimand by Holmes for absence due to his illness, which Petitioner promptly reported to human resources. (Pet. App. 49a-50a).

On or around March 1, 2015, Wantou filed a formal complaint of discrimination citing the disparate treatment provided to him by management in comparison to his co-pharmacist. (Pet. App. 51a). A few days after Wantou's complaint, CVS revisited the events of January 24, 2015, and accused Wantou of leaving the pharmacy unattended on January 24, 2015. On April 15, 2015 CVS issued a Level III discipline to Wantou for allegedly leaving the pharmacy unattended on January 24, 2015. On April 15, 2015, Holmes issued a Level III to Wantou for leaving the pharmacy unattended on January 24, 2015. Wantou then immediately filed a complaint of retaliation to the EEOC, stating that the Level III discipline was for filing a complaint of discrimination on March 1, 2015.

Wantou was ultimately fired from his position in January of 2016. (Pet. App. 57a-58a). Latara Wellman, a pharmacy technician at the Oxon store, became involved in a physical altercation with a disgruntled customer and as a result, CVS management ordered Wantou to fire her. (Pet. App. 56a). Holmes claims that she gave Wantou this directive in November and then again in December 2015, although Wantou has maintained that he did not receive this instruction until January 2016. (Pet. App. 56a-57a). Regardless, on January 8, 2016 Holmes told Wantou that he had until the end of the day to fire Ms. Wellman or he would be terminated. (Pet. App. 57a). Wantou asked Holmes if he could put the directive in writing, but this request was denied by Holmes. (Pet. App. 57a).

Wantou immediately called the CVS ethics complaint line and claimed that Holmes was trying to

put him in an impossible position. If Wantou fired Ms. Wellman, Holmes could deny having given him that instruction to retaliate against him, as she had done in the past (In February 2019, a jury found that Holmes retaliated against Wantou when she issued him a Level III discipline stating that he disobeyed her in going to his car to warm while the evidence showed that she gave Wantou permission to go to his car). As other employees in the store, including the store manager (Roland Saibu)[1], Wantou believed that Latara Wellman was attacked by the customer, and that she defended herself from the customer. Furthermore, Wantou filed more complaints through the CVS ethics line on January 3, January 5, and January 7 claiming racial discrimination and retaliatory actions on the part of his employer. (Pet. App. 57a). Ultimately, Wantou was fired by Holmes on January 11, 2016. (Pet. App. 57a-58a).

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[1] Roland Saibu said, in his deposition, that immediately after the altercation, he talked to shift manager and eye witness Yolanda (a shift manager), and she said that the customer had verbally and physically threatened Wellman, had trespassed to attack Wellman, and that Wellman tried to defend herself, and that this was the "consensus in the store" (ECF 72-30, Roland's deposition, [40:7-8], [40:2-3], [40:21], [41:2], [40:11-12]). Roland also said that this was confirmed by him after he watched the video (ECF 72-30, Roland's deposition, [42:9-15]).

C. Procedural History

On December 14, 2016, Wantou brought suit against CVS in the United States District Court for the Northern District of Texas claiming that he was subjected to discrimination due to his race, gender, and national origin and fired as an act of retaliation. (Pet. App. 5a). Shortly thereafter, the case was transferred to The United States District Court for the District of Maryland. (Pet. App. 5a).

CVS filed a motion for summary judgment, which was partially granted by the District Court on December 7, 2018. (Pet. App. 5a). The Court allowed the claim of retaliation related to Wantou's discipline for leaving the pharmacy to proceed to trial. (Pet. App. 7a-8a).

The trial arrived at two distinct conclusions. First, after a seven-day jury trial on liability, a jury returned a verdict in favor of Wantou on his retaliation claim, awarding him $125,000 in compensatory damages. (Pet. App. 8a). Second, a three-day jury trial was held before a different jury to determine whether Plaintiff was entitled to punitive damages. (Pet. App. 8a). On this issue, the jury returned a verdict in favor of CVS. (Pet. App. 8a). Both parties attempted to overturn the adverse decisions against them; both parties requests were denied by the Maryland District Court on November 5, 2019. (Pet. App. 41a-42a).

Wantou appealed the District Court's decisions i) finding for CVS on the punitive damages claim, and ii) granting CVS's motions for summary judgment. On September 24, 2020, the United States Court of

Appeals for the Fourth Circuit affirmed the decision of the District Court, finding "no reversible error."(Pet. App. 2a-3a). On January 20, 2021, the Fourth Circuit denied Wantou's petition for rehearing and rehearing en banc without further elaboration. (Pet. App. 83a-84a).

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. The United States District Court for the District of Maryland Erred When It Dismissed the Impaneled Jury and Ordered a Separate Trial on Punitive Damages Without Requiring the Knowledge and Consent of the Plaintiff.

This Court should find that the District Court erred when it dismissed the jury in Wantou's liability case and ordered a new trial on the issue of damages, all without providing Wantou the opportunity to object and without seeking his knowledge or consent. As a result, this Court should find that Wantou was prejudiced by the District Court's actions.

A. The District Court Erred When It Dismissed the Jury in Wantou's Trial Without Providing Him an Opportunity to Be Heard

The Due Process Clause of the Fifth Amendment to the United States Constitution guarantees a claimant's right "to be heard at a meaningful time in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)."Due process requires that parties be given notice and an opportunity to be heard before an ultimate judicial determination is made." *In re Circuit City Stores, Inc.*, No. 08-35653, 2009 Bankr. LEXIS 4011 at *8 (Bankr. E.D. Va. Dec. 3, 2009).

The United States District Court for the District of Maryland erred when it dismissed the impaneled jury, who was to hear the punitive damages phase right

after reaching the verdict on the liability phase, without providing Wantou an opportunity to be heard, to participate, or to consult with his attorney. Near the close of Wantou's trial on the issue of liability, the District Court gave the Defendant CVS the latitude to delay the trial for several days at the Defendant's sole convenience. (Pet. App. 85a-87a). Wantou made his opposition to this delay known; he wished to return to his place of residence in Texas as soon as possible to resume his daily activities. (Pet. App. 87a).

The District Court then inquired as to the parties' opinions on dismissing the impaneled jury and trying the issue of issue of punitive damages. (Pet. App. 87a). CVS was in favor of the idea, while Wantou's attorney remained silent.(Pet. App. 87a). At this point, the Court motioned for Petitioner's Counsel to approach the bench. (Pet. App. 90a). This prevented Wantou from hearing and participating in this important discussion in which his rights would be infringed. The Court and Wantou's attorney held a private bench conference on the issue of dismissing the impaneled jury. (Pet. App. 90a).This discussion took place right before the District judge ordered the impaneled jury waiting outside to enter the room and read the verdict. Right after the discussion, the District judge ordered the jury enter the courtroom and read the verdict. Immediately after the verdict was read, the District judge dismissed the jury after having the counsels repeat their agreement to dismiss the jury (Pet. App. 90a). It is only at this point that Wantou became aware that the jury was being dismissed.

In making this decision, the District Court failed to provide Wantou an opportunity to be heard. The Due Process Clause requires that parties be given notice and an opportunity to be heard before an ultimate judicial determination is made. *See In re Circuit City Stores, Inc.*, No. 08-35653 at *8.

The agreement between the Court and the counselors dismissing the jury cannot be attributed to Wantou, since it was done in violation of Wantou's Fifth amendment right to participate and be heard. "Since an attorney is merely the representative or agent of the litigant and not the litigant's "alter ego," *Carlisle v. County of Nassau*, 64 App. Div.2d 15, 19, 408 N.Y.S.2d 114, 117 (1978), and "a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment." *Helminski v. Ayerst Lab., a Div. of A.H.P.C*, 766 F.2d 208, 213 (6th Cir. 1985).

By failing to provide Wantou with an opportunity to be heard and voice his objections to dismissal of the jury and the postponement of the trial on the record, the District Court denied him due process of law.[2]

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[2] Wantou has also alleged that the District Court violated his Fifth Amendment rights when, shortly after dismissing the jury, the District Court judge held an outside-of-the-Courtroom, off-the record, private conference call with the attorneys, without inviting Wantou, and referred his case to a settlement conference. This creates the appearance that the real reason for the jury dismissal was to order a settlement conference to the benefit of the District Judge, the plaintiff's counsel (who was working on a contingency basis) and CVS's counsel.

Wantou was not provided with an opportunity to be heard at a meaningful time and in a meaningful manner, and consequently this Court should find that the District Court violated the Due Process Clause of the Fifth Amendment.

B. The District Court Erred When It Allowed Wantou's Attorney to Consent to What Was Effectively a Postponement Without Receiving the Knowledge and Consent of His Client.

Furthermore, the District Court erred when it allowed Wantou's trial counsel to effectively postpone the date of the trial without Wantou knowledge and consent.

In a discussion regarding whether or not to postpone the punitive damages trial, the Court offered to dismiss the impaneled jury and for that portion of the dispute to be heard in front of another jury.(Pet. App. 87a – 90a). Wantou made it known that he would be returning to his home state of Texas after the conclusion of the proceedings, and that he wished to see them conclude quickly. (Pet. App. 87a). Trial Counsel initially remained silent when asked by the court if he would accede to such an agreement. (Pet. App. 87a). However, after a bench conference with the judge, excluding Wantou and inaudible to Wantou, Trial Counsel immediately agreed to the proposal without first consulting his client.(Pet. App. 90a).

Maryland Rule 107 clearly delineates that "no motion seeking the postponement of any trial shall be made by any counsel without the knowledge and

consent of the client whom that counsel represents." D. Md. Rules 107 (2). Rule 107 shows that that the U.S. District Court of Maryland itself recognizes that the postponing of a trial, let alone the postponing of a trial and dismissing of a jury, as part of a client's fundamental rights that requires his explicit consent, and cannot be done only through an agreement with his counsel.

In deciding to dismiss the impaneled jury and have the case heard by a different jury at an undetermined date, the Court was effectively engaging in a postponement proceeding. Therefore, this Court should find that the District Court erred in dismissing the impaneled jury and postponing the trial without first ensuring that Wantou had an opportunity to provide knowledge and consent to his attorney.

II. The Fourth Circuit Court of Appeals Erred in Affirming the Order of the District Court When They Held That The District Court of Maryland Did Not Commit Reversible Error.

This Court should find that the Fourth Circuit Court of appeals erred when it concluded that the District Court did not commit reversible error. The Fourth Circuit failed to conduct a thorough review of the facts, and consequently this Court should grant Wantou's appeal and overturn the Fourth Circuit's decision.

Generally speaking, the Trial Court has discretion to apply the law to the cases before them as they see fit. However, the role of the appellate courts is to

ensure the soundness of the trial court's reasoning, not merely to act as a "rubber stamp" for the Trial Court's decision. *Wilson v. Volkswagen of Am.*, 561 F.2d 494, 506 (4th Cir. 1977). The Fourth Circuit has previously found that "[even] if a district court applies the correct legal principles to adequately supported facts, the discretion of the trial court is not boundless and subject to automatic affirmance. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. S.C. May 20, 1999) (citing *Wilson,* 561 F.2d 494 at 506).

In the words of the Fourth Circuit Court of Appeals,

> This does not mean, though, that an appellate court should automatically affirm such exercise of discretion. It has been said that an appellate court "would be remiss in [its] duties if [it] chose only to rubber stamp such orders of lower courts." On the contrary, it is obligated "to consider the full record" as well as the reasons assigned by the Trial Court for its judgment, and to reverse the judgment below, if after such review, the appellate court "'has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'"

Wilson, 561 F.2d 494 at 506 (citing *Finley v. Parvin/Dohrmann Company, Inc.*, 520 F.2d 386, 390 (2d Cir. 1975), *In re Josephson*, 218 F.2d 174, 182 (1 Cir. 1954), *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974), *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976), *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658-9 (6th Cir. 1976).

Traditionally, when "a district court exercises its discretion in a case-dispositive manner, this court should scrutinize the exercise of that discretion with care to ensure that there has not been 'an error of judgment' by the district court. Where, as here, such a prejudicial error of judgment comes before us, [the Fourth Circuit Court of Appeals] should correct the error. *Aikens v. Ingram*, 652 F.3d 496 (4th Cir. 2011) (citing *Wilson,* 561 F.2d 494 at 506). This requirement applies to the award of punitive damages cases as well. *See Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991)

This Court should find that the Fourth Circuit Court of Appeals erred when it affirmed the order granted by the District Court and found that the record did not present any reversible error. (Pet. App. 2a - 3a).The opinion issued by the Fourth Circuit was less than one page long and did not include any reasons why Wantou's claims were not supported by a reasonable review of the record. (Pet. App. 2a - 3a).

Wantou's claims clearly have substantial merit. He was deprived of due process of law, claimed that he was subjected to a byzantine process that caused him prejudice, and went through years of protracted litigation. The record submitted to the Fourth Circuit was lengthy and related to many complex issues. The claims presented to the Fourth Circuit concerned a serious allegation of racial prejudice on the part of a large corporation.

Despite these myriad reasons to treat Wantou's case with the utmost care, the Fourth Circuit was unable or unwilling to justify its holding on either factual or legal

grounds. Based on the decision issued, the Fourth Circuit appears to have acted as a mere "rubber stamp" for the District Court. The Court of Appeals' decision in *Wantou* is the exact type of ruling that it had previously cautioned against in *Wilson*. As a result, this Court should find that the Fourth Circuit erred when it unquestioningly affirmed the decision of the District Court and found that the record did not present any reversible error.

III. The Fourth Circuit Court of Appeals Erred when it Affirmed the United States District Court for the District of Maryland's Decision Granting the Rule 56 Standard for Summary Judgment

The District Court erred when it granted CVS's motion for summary judgment. The Fourth Circuit Court of Appeals compounded this error when it affirmed the District Court's opinion on appeal.

A. The District Court improperly applied the burden shifting framework found in Federal Rule of Civil Procedure 56

The District Court found that there was:

> [no] way for Wantou to satisfy his burden of showing he would not have been fired but for his complaints to management or the EEOC. I conclude his termination does not support a retaliation claim under state or federal law.

See Pet. App. 80a.

Under Federal Rule of Civil Procedure 56(a), Wantou does not have the burden of showing that he would not have been terminated but for his complaints to management or the EEOC. It is the movant and Defendant CVS that has the burden to show that there or no issues of material facts or genuine issues for trial. Fed. Rule Civ. Proc. 56(a). *See also Renchard v. Prince William Marine Sales*, Inc., 87 F.Supp. 3d 271, 277 (D.D.C. 2015).

As a result, this Court should find that the Fourth Circuit erred in affirming the District Court's decision since it was based on an impermissible burden shifting under Federal Rule 56(a). This error caused Petitioner prejudice, and consequently this Court should grant Wantou's petition.

B. Genuine issues of material fact remained unsettled at the time of the District Court's decision to grant CVS' motion for summary judgment.

Not only did the District Court err by shifting to Wantou the burden of disproving CVS' official reason for his firing, it also erred by resolving material facts in dispute in favor of CVS. A motion for summary judgment is only proper when "there can be but one reasonable conclusion as to the verdict. *"Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 250 (1986).

In the instant case, there is no question that CVS had a retaliatory animus against Petitioner, as the jury unanimously found that CVS's Level III reprimand of April 15, 2015 meted out to Petitioner was illegally retaliatory.

On the issue of termination, the District Judge found that Petitioner made a prima facie case on retaliation, as he stated "These facts persuade me that Mr. Wantou has met his burden, at the summary judgment stage, of establishing a prima facie case for both the April 2015 Level III warning and his January 2016 termination." In addition, the District Court noted that Petitioner's termination occurred mere days after he registered a series of complaints with the CVS ethics complaint line." Still, the District Court granted CVS summary judgment, stating: "there is still no question that Wantou-knowing a member of his staff had physically assaulted a customer (a fireable offense) — disobeyed a direct order, despite a warning that his refusal to comply with his supervisor's instructions could result in termination."

As an initial matter, the District Court's decision erroneously resolved all the disputed issues in favor of the defendant. The District judge erroneously credited CVS's allegation that Wellman assaulted a customer. CVS's allegation that Wellmanassaulted a customer is contradicted not only by Petitioner's affidavit (which opposed summary judgment in accordance with Rule 56(c)(4)) (ECF 72Ex. 5, Wantou affidavit ¶ 67), but also by the deposition testimony of the store manager, Roland Saibu ("Roland") (ECF 72-30, Roland's deposition,[40:7-8], [40:2-3], [40:21], [41:2], [40:11-12]). As such it is a material fact in dispute to be resolved by a jury, not the Court, and CVS is not entitled to be believed on this issue, based on mere conclusory assertions.

In his affidavit, Petitioner stated that eyewitnesses were unanimous that it was the customer that had attacked Wellman in the restricted area of the pharmacy." (ECF 72-Ex. 5, Wantou affidavit ¶ 67). This is substantiated by deposition testimony from the store manager, Roland, (ECF 72-30, Roland's deposition, [40:7-8], [40:2-3], [40:21], [41:2], [40:11-12]). Roland said that immediately after the altercation, he talked to shift manager and eyewitness Yolanda (a shift manager), and she said that the customer had verbally and physically threatened Wellman, had trespassed to attack Wellman, and that Wellman tried to defend herself, and that this was the "consensus in the store" (ECF 72-30, Roland's deposition, [40:7-8], [40:2-3], [40:21], [41:2], [40:11-12]). Roland also said that this was confirmed by him after he watched the video (ECF 72-30, Roland's deposition, [42:9-15]).

Second, the District Court erred in making the determination that Petitioner was insubordinate and refused to terminate Wellman on January 8, 2016. The record shows that Petitioner did not refuse to terminate Wellman when given the instruction to do so on January 8, 2016; instead, Petitioner asked that Holmes put the instruction in writing and contacted the CVS Ethics Line. Petitioner believed that Holmes could use Petitioner's compliance with her instruction to later retaliate against him, given her history of doing so, as she had done when she retaliated on April 15, 2015. The record shows that Petitioner was justified in his fear, as a jury found, and the Fourth Circuit upheld, that CVS and Holmes retaliated against Petitioner when she meted him a Level III discipline on April 15, 2015 (ECF 130, ECF 165) for

doing precisely what she had approved. As to this Level III discipline of April 15, 2015, the trial record shows that Holmes gave permission to Petitioner to go to his car and later lied about it to retaliate against him, alleging that Petitioner had been insubordinate in going to his car (2/25/19 Tr. PM Holmes 7:21-25; 8:1-4), (2/25/19 Tr. PM Holmes 84:14-25; 85:1-13).

A "judge's function at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *"Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 249 (1986), and "it is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Pollar v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). "Thus, the court must review all the evidence in the record," (*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). at 135 (*citing Matasushita v. Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986))), "drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing evidence (Id. (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555(1990))."The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court." Id. (citing *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 255 (1986)). "Thus, although the court reviews the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." Id.

Not only did the District Court misconstrue the facts, but it also disregarded evidence of animus and mendacity on the part of Holmes, which can establish pretext, and therefore suffices to create a genuine issue of material fact. And even if one assumes, arguendo, that Petitioner was insubordinate, the District Court's decision is still at odds with Supreme Court's, the Fourth Circuit, and other circuits' precedents as will be shown below.

The District Court correctly pointed out that Petitioner's "response in opposition to the motion for summary judgment argues emphatically that Ms. Holmes was not telling the -truth when she said she personally instructed him on November 25, 2015, and again on December 17, 2015, to fire Ms. Wellman." However, the District Court erroneously dismissed this apparent falsity as immaterial on the basis that Petitioner was allegedly insubordinate regardless of falsity in CVS's explanation. This was manifestly erroneous, as the issue to be resolved by the trier of fact was not whether Petitioner was insubordinate but instead, whether the alleged insubordination was the real reason CVS fired Petitioner or just a convenient pretext for retaliation. Petitioner's only duty at summary judgment stage was to show that genuine issues of material fact as to pretext existed, e.g., by showing that CVS's explanation was false or unworthy of credence. This is because "it is permissible for the trier of fact to infer the ultimate discrimination[/retaliation] from the falsity of the employer's explanation. *"Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). "[T]he factfinder is entitled to consider a party's dishonesty

about a material fact as affirmative evidence of guilt." Id. Here, the ultimate issue to be resolved by the trier of fact is not whether Petitioner was insubordinate but instead whether insubordination served a pretext for retaliating against Petitioner. Hence, any fact tending to show pretext, notably the falsity in CVS's explanation itself, is material.

The District Court's finding that no genuine issue of material fact existed in Wantou's case is clearly erroneous, and as a result this Court should find that the Fourth Circuit's affirmance of that decision was in error.

C. The District Court Summary Judgment Decision on the Petitioner's Retaliation Claim Related to His Termination is in Conflict With Supreme Court Precedent Set in Reeves vs. Sanderson, Other Supreme Court Cases and Other Fourth Circuit Precedents.

Even if one assumes, arguendo, that petitioner was insubordinate, the District Court and Panel decision is still at odds with Reeves by holding that even if Holmes lied about instructing Petitioner to terminate Wellman on November 25, 2015 and December 17, 2015, Petitioner cannot prevail in his retaliation claim regarding his termination by Holmes. The District Court manifestly erred in ascribing as legitimate, an explanation that CVS itself did not allege for terminating Petitioner. See, e.g., *Lee v. Russell County Bd. Of Educ.*, 684 F.2d 769, 775 (11th Cir. 1982) (rejecting, on appeal, the legitimate nondiscriminatory reasons/explanation "assigned by the court" because

they were "not [reasons/ explanations] articulated by [the decision-makers] when they were questioned"). Namely, Holmes herself alleges giving an ultimatum to Petitioner on January 8, 2016 on account that on two prior occasions (allegedly on November 25, 2015 and December 17, 2015) she had allegedly instructed Petitioner to terminate Wellman and Petitioner failed to do so (Holmes's deposition, ECF 72-1(C): [293:12-15]); but the District Court dismissed the showing of falsity by Petitioner as to the allegation by Holmes that she had instructed Petitioner on two prior occasions (November 25, 2015 and December 17, 2015) to terminate Wellman, with the District Court reasoning that there was no dispute that Holmes instructed Petitioner at least once, on January 8, 2016, to terminate Wellman.

CVS justified terminating Petitioner due to Petitioner allegedly failing to terminate Wellman after Petitioner was told three times by Holmes to terminate Wellman. Petitioner proved that the allegation that he was told three times to terminate Wellman was false, and that the first and only time he was ever told by Holmes to terminate Wellman was on January 8, 2016. "[O]nce the employer's justification has been eliminated, discrimination[/retaliation] may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *"Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134 (2000). It is not for the DISTRICT COURT to determine whether instructing Petitioner once, twice, or three times would constitute a valid reason for terminating Petitioner, but instead, the duty of the District Court, at summary judgment

stage, is to determine whether the explanation given by CVS for terminating Petitioner (namely that CVS gave Petitioner an instruction three times that Petitioner failed to follow) suffers no issue as to falsity and hence pretext. In addition, there would be no reason for Holmes to fabricate instructing Petitioner to terminate Wellman on November 25, 2015 and December 17, 2015if not for improper motives, including retaliation.

Wantou presented evidence that Holmes was not telling the truth when she stated that she instructed him in November 2015 and December 2015 (ECF#70-1, p. 28-31). In particular, at deposition, store manager Saibu completely contradicted Holmes' claim that she gave an in-person instruction to Wantou on November 25, 2015 or December 17, 2015 (ECF 72-30, Saibu 55: 21-22; 56:1-5; 56: 14-18; 61: 2-3; 61: 9-17; 63:12-21; 66:1-4)[3].

In granting the defendant's motion for summary judgment, the District Court stated that Petitioner "has not presented any facts tending to show that these calls were the 'real reason 'Holmes decided to terminate his employment." In effect, the Court required Petitioner to prove "Pretext Plus". However, the District Court decision is at odds with the Supreme Court's holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the

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[3] After taking a break during deposition and talking to his attorney (CVS's attorney), Saibu changed his testimony. Therefore, a reasonable jury would be entitled to believe that both Saibu and Holmes are not telling the truth, as Saibu's testimony at first contradicted Holmes, but he changed it after talking to CVS attorney during break.

employer's asserted justification is false may permit the trier of fact to conclude that the employer unlawfully discriminated [or retaliated]."*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). In *Reeves*, there was no dispute that Reeves established a prima facie case of discrimination. Sanderson's rebuttal asserted that Reeves had been terminated "due to his failure to maintain accurate attendance records" and his "failure to discipline absent and late employees." Reeves "[m]ade a substantial showing that [Sanderson Plumbing]'s explanation was false." Id. at 134. However, the Fifth Circuit concluded that "there was insufficient evidence for a jury to find that Sanderson discharged Reeves because of his age. *"Reeves v. Sanderson Plumbing Prods., Inc.*, 197 F.3d 688, 693 (5th Cir. 1999).

The Supreme Court reversed the Fifth Circuit and held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated [/retaliated]." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 135 (2000). Thus, the Supreme Court ruled that the Fifth Circuit "erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination [/retaliation]." Id. at 149.

The Fourth Circuit decision is also in conflict with 4th Circuit precedent that "a plaintiff may [defeat summary judgment] through direct evidence of conduct or statements that both reflect directly the alleged discriminatory[/retaliatory] attitude and that bear

directly on the contested employment decision." See *Rhoads v. F.D.I.C.*, 257 F.3d 373, 391-92 (4th Cir. 2001); In this case, the District Court ruled that, assuming that Rhoads made out a prima facie case of retaliation, she failed to demonstrate that the FDIC's proffered reason for her termination — her excessive, unexcused absenteeism — was untrue and, thus, a pretext for discrimination. The 4th Circuit reversed the District Court decision, stating that direct evidence of a stated purpose to discriminate coupled with indirect evidence such as the timing of Rhoads's firing created a genuine issue for trial. Petitioner's case is much stronger than *Rhoads*. Here there is no dispute that Petitioner has made prima facie case. In addition, unlike in *Rhoads*, Petitioner has not merely submitted direct evidence of CVS's stated purpose to retaliate against him, but actual evidence of retaliation in the form of jury verdict that CVS retaliated against him on April 15, 2015 for making Title VII complaints. Moreover, CVS terminated Petitioner days after he made a Title VII complaint of discrimination. Therefore, just as in Rhoads, there is a genuine issue for trial as to the retaliation claim regarding Petitioner's termination.

The Fourth Circuit's affirmance of the DISTRICT COURT's decision is clearly at odds with Supreme Court and Fourth Circuit precedent, and as a result this Court should find that the Fourth Circuit's affirmance of that decision was in error.

D. The Decision by the District Court and the 4th Circuit that Wantou's Alleged Insubordination In the Face of Prior Animus Is Dispositive of Retaliation Creates a Circuit Split that Must Be Resolved By The Supreme Court.

The Fourth Circuit position that Wantou could not defeat summary judgment because he was allegedly insubordinate on January 8, 2016 (which is contradicted by the evidence) is at odds with other Circuits' decisions in very similar cases. In the case of *Kelley v. Corr. Med. Servs., Inc.*, the 1st Circuit reversed a District Court's grant of summary judgment (on the basis that the plaintiff had failed to raise a genuine issue of material fact as to whether the employer's stated reason/explanation for her termination was a pretext for retaliatory animus) on the retaliation claim of an employee, Katherine Kelley ("Kelley"), who was fired for insubordination by her former employer, Correctional Medical Services, Inc. ("CMS"). *Kelley v. Corr. Med. Servs., Inc.*, 707 F.3d 108 (1st. Cir. 2013). Kelley was terminated by her supervisor, Theresa Kesteloot ("Kesteloot") for insubordination on October 17, 2008; and the District Court found that although Kelley had made out a prima facie retaliation claim, CMS had presented sufficient evidence of a legitimate, non-discriminatory reason for her termination, namely, Kelley's refusal to obey her supervisor's instruction. Id. at 115. "The only issues on appeal [were] whether the District Court erred in concluding that Kelley failed to raise a genuine dispute of material fact to pretext and retaliatory animus." Id. The 1st Circuit held that based on

Kesteloot's prior manifest illegal animus towards Kelley, "a reasonable factfinder could conclude that Kelley's refusal to obey an instruction of Kesteloot served as a convenient pretext for eliminating an employee who had engaged in ADA-protected conduct one too many times." Id. at 117. The 1st Circuit went on to say that a reasonable factfinder could find that Kesteloot's termination of Kelley was a "disingenuous overreaction to justify dismissal of an annoying employee who asserted [her] rights under the ADA rather than the firing of an insubordinate employee." Id. at 118 (internal quotations omitted). The 1st Circuit further held that:

> In granting summary judgment, the district court focused almost exclusively on Kelley's insubordination. The court concluded that on October 17, Kesteloot had made an effort to accommodate Kelley by requiring Voorhees to handle the physically demanding duties, thereby rendering baseless Kelley's resistance to assuming responsibility for the main clinic. Although this view of the record is reasonable, it disregards the record evidence of Kesteloot's ongoing disability-based animus and the way in which that animus might have influenced Kesteloot's [termination of] Kelley.
> [. . . .]
>
> While the ADA is not a license for insubordination at the workplace, […] the employer cannot invoke the specter of insubordination in order to mask retaliation". Id. (emphasis added, internal quotations omitted).

The various circuits courts of appeal are replete with cases holding that when a plaintiff has adduced sufficient evidence as to the employer's past retaliatory animus, it is for the factfinder and not the court, to decide whether insubordination (even when it actually occurred) was the real reason for the employer's adverse action or just a pretext. See e.g. *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 200 (7th Cir. 2011) (holding that based on the employer's retaliatory animus, a reasonable factfinder could find that the dismissal of the employee was a disingenuous overreaction used as a pretext to retaliate against the employee for engaging in protected activity); *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 190 (3d Cir. 2003) (holding that the employee had presented sufficient evidence that the employer had retaliatory animus and "fired [her] in retaliation for her protected activity rather than (or in addition to) her insubordinate behavior").

In the instant case, there is no question that CVS had a retaliatory animus against Petitioner, as the jury unanimously found that CVS's Level III reprimand of April 15, 2015 meted out to Petitioner was illegally retaliatory.

IV. The Fourth Circuit Court of Appeals Erred when it Affirmed the United States District Court for the District of Maryland's Decision Granting CVS's Rule50 Motion on Maryland Punitive Damages During the Trial

The decision by the District Court granting Defendant CVS's motion for Judgment as a Matter of

Law under Federal Rule of Civil Procedure 50 was made in error. The standard for granting a Rule 50 motion (judgment as a matter of law) is exceedingly high.

A court "may grant judgment as a matter of law only if, viewing the evidence in a light most favorable to the non-moving party and drawing every legitimate inference in the party's favor, … the only conclusion a reasonable jury could have reached is one in favor of the moving party. *"Saunders v. Branch Banking & Tr. Co. of Va.*, 526 F.3d 142, 147 (4th Cir. 2008).

The role of the Court in any Rule 2-501 motion is not to decide whether there is clear and convincing evidence to submit the case to a jury. Instead, "the court must review all the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing evidence . . . The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 135 (2000) (citing *Matasushita v. Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990), *Anderson*, 477 U.S. at 255.)

A District Court is not in a position "to disregard stories that seem hard to believe," *Gray v. Spillman*, 925 F.3d 90, 95 (4th Cir. 1991). Instead, the district court is required to construe the record evidence favorably to the nonmovant—Wantou—even if it does not believe that the nonmovant would prevail at trial. *See Jacobs v. N.C. Admin. Office of the Courts,* 780

F.3d 562, 568 (4th Cir. 2015). The Court's duty is only to consider whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 248.

"Thus, although the court reviews the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id*. The Court must also "assume that the testimony in favor of plaintiffs was credible, unless totally incredible on its face, and ignore evidence to rebut it." *Duke v. Uniroyal Inc*., 928 F.2d 1413, 1419 (4th Cir. 1991). When a genuine issue of material fact is identified, the district court is "obliged to accept [the nonmovant]'s version of events." *Harris v. Pittman*, 668 F. App'x 486 (4th Cir. 2016) (per curium).

The District Court erred in granting Defendant CVS' motion for summary judgment despite the existence of a genuine issue of material fact. By finding that there was no genuine issue to be determined by the trier of fact, the District Court made an impermissible credibility determination as to the retaliatory nature of Wantou's Level III discipline. There was certainly more than "one reasonable conclusion as to the verdict." Therefore, the District Court's grant of judgment as a matter of law was improper.

MD Code—SG §20-1013. MD Code—SG §20-1013(e)(1)(ii) states that punitive damages may be awarded by the court if: "the court finds that the respondent has engaged in or is engaging in an unlawful employment practice with actual malice." The basic criteria by which to judge a defendant on the punitive damages issue in Maryland was stated in an

oft-cited 1884 case: "To entitle one to such damages there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act. . . .[T]o entitle the plaintiff to recover punitive damages. . . .**the jury** must find that the wrongful act was done wantonly, or willfully, or in the spirit of oppression. **It is the evil motive or intention with which the wrongful act is done. . .on which rests the rule of punitive damages.**" *Philadelphia, Wilmington & Baltimore Railroad Co. v. Hoeflich*, 62 Md. 300, 307-309 (1884) (Emphasis added). "We specifically hold that, in a suit for [punitive damages]. . .it must be shown by the plaintiff in order to recover punitive damages that the [defendant] not only acted wrongfully but without just cause or excuse, and with the evil motive to injure or oppress, or at least with a reckless disregard of the rights of the person injured." *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 617, 56 A.2d 813, 817 (1948). There is no question that there was sufficient evidence of evil motive to injure and oppress Wantou, malice, fraud and reckless disregard for Wantou's rights under Title VII/§ 1981/ Maryland Code--SG §20-602 et seq., and therefore Wantou was entitled to jury trial as to punitive damages under Maryland Code--SG §20-1013 et seq.; and in any event, the District Court did not perform any review of the evidence that had been presented to the jury, not even a cursory one prior to granting CVS's judgment as a matter of law. The District judge simply stated:

> *So I am ruling right now that there is no clear and convincing evidence of punitive damages. So for purposes of that state claim, there will be --*

> *there is not enough to go to the jury on clear and convincing evidence.(2/22/19 Tr. PM 63:5-8.).*

Clearly the Court substituted itself for the jury. Moreover, the District Court used the manifestly erroneous standard that the plaintiff had not presented "clear and convincing evidence," instead of the correct standard, which was to decide whether there were genuine issues for trial as to the Maryland State Law issues in questions.

There is no question that there was a genuine issue for trial on Maryland punitive damages. Upon ruling on the post-trial motions, the District Judge himself stated: "the jury reasonably could have believed the Plaintiff's evidence that he had permission (or at least acquiescence) from his supervisor for his actions and that the reason the disciplinary incident was later revisited and the disciplinary action escalated was because of Plaintiff's well-documented discrimination complaints." (ECF No 205, p. 3). So clearly, the jury could have believed that Wantou's supervisor acted intentionally, with malice, and with reckless disregard to Wantou rights under Maryland law.

The Fourth Circuit's affirmance of the District Court's decision granting CVS' motion for judgment as a matter of law was improper. Accordingly, this Court should grant Wantou's petition for a writ of certiorari.

V. The Fourth Circuit Erred When It Upheld the District Court's Decision Finding that the District Court's Dismissal of the Impaneled Jury and the Trial of the Punitive Damages Issues Under a Different Jury Did Not Infringe on His Seventh Amendment Right to a Jury Trial

The Fourth Circuit erred in affirming the District Court despite the fact that Wantou's right to a trial by jury was violated. The Fourth Circuit has previously held that - Whenever a District Court bifurcates between the liability issue and the issue of punitive damages, the proper procedure is to have the jury determine in the first phase (along with liability and compensatory damages) "whether punitive damages are to be awarded." Then, during the bifurcated phase, the parties "present evidence relevant to the factors for finding the appropriate amount."

See Mattison v. Dallas Carrier Corp., 947 F. 2d 95,110 (4th Cir. 1991)

By way of analogy, the Seventh Circuit Court of Appeals has previously held that dividing a trial so that different juries would examine the same issues constitutes an abuse of discretion. In *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995) the Court stated the "district judge must carve at the joint" and that "the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries" *Id*. at 1302-03.

Furthermore, the Seventh Circuit stated that "[the] right to a jury trial in federal civil cases, conferred by

the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact. "*Id.* at 1303. *See also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996) ("The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues. Thus, [the] Constitution allows bifurcation of issues that are so separable that the second jury will not be called upon to reconsider findings of fact by the first.")

The Fourth Circuit did not follow these guidelines when bifurcating Wantou's trial. The issue of whether or not CVS' issuing of a Level III discipline to Wantou for alleged leaving the pharmacy unattended and violated Maryland Board of Pharmacy Rules and Regulations was retaliatory was litigated both at the liability trial and the punitive damages phase. *See* Pet App. 46a.

The decision of the District Court to try the liability case and punitive damages case under two separate juries without separating the issues runs against established precedents from the U.S. Supreme Court and from the Fourth Circuit.

This Court has held that questions in a single suit "can only be tried by different juries if they are so distinct and separable from each other that a trial of them alone may be had without injustice." Gasoline *Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931). See also *Miller v. American Bonding Co.*, 257 U.S. 304, 308

(1921) ("In actions at law the general practice is to try all the issues in a case at one time; and it is only in exceptional instances where there are special and persuasive reasons for departing from this practice that distinct causes of action asserted in the same case may be made the subjects of separate trials.") See also Fed. R. Civ. 42(b)"When ordering a separate trial, the court must preserve any federal right to a jury trial."

A few examples of CVS's re-litigating the liability issue of the first trial include the following: Homes re-litigated whether she gave permission to Wantou to go to his car **[**Trial Tr.; July 10, 2019; A.M.; Holmes:21:7-17], a central issue heavily litigated in the first trial (2/25/19 Tr. PM Holmes 7:21-25; 8:1-4), (2/25/19 Tr. PM Holmes 84:14-25; 85:1-13). Human Resource Manager stating "I disagree with the jury prior, but we issued the Level III because that's what was needed for that situation." **[**Trial Tr.; July 10, 2019; A.M.; Nguyen:138:13-14]. Human Resource Director Orien Hunter testifying that the Level III discipline given to Wantou on April 15, 2015 was warranted because Wantou had allegedly violated policy and put the public at risk [Trial Tr; July 10, 2019; PM Session; Hunter:22:22:23; *Id* 19:12-15]. Loss Prevention Manager James Gerwig stating that Wantou's Level III discipline was appropriate because Wantou had violated policy "But in this instance, this was a policy violation" [Trial Tr,; July 9; PM Session; 43:25]. "Regardless, that would still violate policies, procedures, and laws." [Trial Tr,; July 9; PM Session; 54:23-24].

The issues of whether Holmes gave permission to Wantou to go to his car and whether not the discipline issued to Wantou was appropriate was already decided by the first jury, who decided that Wantou was not disciplined for violating policy or for putting the public at risk, but rather in retaliation for his complaint of discrimination. As such, re-litigating these issues was a violation of Wantou's 7th amendment right to a jury trial and prejudiced Wantou to the new impaneled jury.

As a result, this Court should grant Wantou's petition for a writ of certiorari and allow him to pursue his Seventh Amendment claim before the Supreme Court.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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